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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

THE HONORABLE ARCHIE O. DAWSON,
UNITED STATES DISTRICT JUDGE FOR THE
SOUTHERN DISTRICT OF NEW YORK,

Petitioner,

--against--

THE LUMMUS COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Lummus brief in opposition would have this Court believe that the issues at stake here are disarmingly simple and without significance. To this end, Lummus restates the questions presented in Commonwealth's petition in a way obscuring the far-reaching ramifications of the Second Circuit's decision.

Thus, Lummus' counterstatement fails to meet the serious issue raised by the Second Circuit decision concerning the proper scope of mandamus in the federal courts. Lummus would make it appear that the Second Circuit granted mandamus in large part because it found extraordinary circumstances in the fact that litigation has been pending between the parties for some 30 months. Lummus' objective is to convey the impression that the Second Circuit's decision turned on special factors in the case at bar and has no general application.

The facts are otherwise. The Second Circuit specifically stated that it would "not decide whether the fact that the delay in this case has already lasted for some thirty months would alone constitute an 'exceptional circumstance' " (S.A. 98). The Court proceeded to place its holding exclusively upon the ground that mandamus would issue to prevent relitigation of a "final" determination by another Court of Appeals (S.A. 98, 104).*

Lummus also would cloud the issues raised by the Second Circuit's new definition of "finality". As stated by Lummus, the second question presented would be whether the Second Circuit properly held that a District Court must give conclusive effect to what Lummus says was a "final determination" by the First Circuit, of the "identical issue" before the District Court, in "the same case" (Resp. Br. 2).

As fairly stated by Commonwealth, the second question is whether a District Court is bound to give conclusive effect to a previous decision *rendered on interlocutory appeal,* in related proceedings, by a Court of Appeals of another Circuit. As so stated, the question raises issues of substantial significance concerning the finality of judgments in the federal courts.

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* The Court stated:

". . . . Here *Lummus asserts* the District Judge has directed reexamination of an issue that has been conclusively determined in its favor by another Court of Appeals. The right not to have to relitigate an issue so determined is as much entitled to extraordinary protection as the right to jury trial . . . the right to trial before an unbiased judge . . . or the right to trial directly by a judge rather than initially by a master . . . . *Accordingly* we think the case appropriate for mandamus *if Lummus' assertion* is made out, as we find it to be." (Italics added; S.A. 98)

In Lummus' counterstatement, the decision rendered on interlocutory appeal receives the Orwellian label "final determination".* This, of course, is an attempt to sidestep the issue and to transform what was presented by Commonwealth as a potentially fruitful juridical inquiry, as to "finality" of interlocutory rulings, into a question-begging premise. This and other inadequate descriptions furnish the basis of nearly the whole of Lummus' brief, making that document one hardly responsive to the issues raised in the petition.

Lummus' counterstatement cannot obscure the importance of the issues raised. The effect of the Second Circuit's decision is, as Commonwealth has stated, to:

> 1. Enlarge the scope of the extraordinary writ of mandamus by using it to reverse a District Court determination, unappealable at that stage, solely on the ground that the District Court did not consider itself bound by an earlier decision of the First Circuit rendered in a related proceeding on an interlocutory appeal taken under § 1292(a)(1);
>
> 2. Extend the concept of "finality" of judgments to the point that "conclusive" effect now must be given to decisions rendered on interlocutory appeal where, vaguely, "a court sees no really good reason for permitting it [an issue]

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* It is somewhat astounding that neither in its counterstatement nor at any other point in its brief does Lummus allude to the fact that the appeal taken to the First Circuit by Lummus was pursuant to 28 U.S.C. § 1292(a)(1), allowing appeals from "Interlocutory Orders" granting injunctions. There is no doubt whatever that this is the fact. The First Circuit so stated in the first sentence of its opinion (R. 473; S.A. 34).

> to be litigated again" (S.A. 104). The only guidelines to this purely discretionary test are to be whether the earlier decision, now to be considered "final", is thought by a second court to have been regarded as "not avowedly tentative" by the court rendering it, and whether the second court thinks there was an adequate hearing and an opportunity for review (*ibid.*).*

Commonwealth's position is that these new departures by the Second Circuit raise serious questions of policy and precedent in the federal system and that the startling enlargement of the scope of mandamus, and of the concept of "finality", warrants consideration by this Court.**

We consider, herein, only some of the more significant particular errors in the Lummus brief, by which it carries forward its apparent misunderstanding of these fundamental issues raised by the Second Circuit's decision.

References are to the corresponding headings in Commonwealth's petition and the Lummus brief.

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* The issues raised by Questions III and IV presented in Commonwealth's petition are also somewhat obliquely treated in Lummus' brief. A few comments on these matters appear later in this reply.

** Lummus' counterstatement (Resp. Br. 2) also shows a misconception of the effect of this Court's denial of certiorari, which is in no way a determination on the merits or binding in subsequent litigation. *United States* v. *Shubert*, 348 U.S. 222 (1955); *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 917-19 (1950); see *Chessman* v. *Teets*, 354 U.S. 156, 164 n. 13 (1957). This misconception is not very material here, however, since the issues in the present action are entirely different from those presented in the earlier petition for certiorari based on the First Circuit decision.

Statement of the Case

This portion of Lummus' answer contains little of direct bearing on the issues. Thus, Lummus initially attempts to argue the factual merits of the various claims which might arise under the contracts if, contrary to Commonwealth's contentions, there were any contracts. It is enough to say that Lummus' allegations with respect to supposed merger of pre-contract guarantees and representations into the contract (Resp. Br. 4), and with respect to acceptance test provisions and other contractual matters (Resp. Br. 4-5), are not relevant to the questions presented here.

Lummus then makes an argument that the First Circuit decision was concerned principally with Commonwealth's motion, in Puerto Rico, for a stay of arbitration (Resp. Br. 5-8). Building on this, Lummus would have this Court infer that the First Circuit found that Commonwealth had not raised a substantial issue as to Lummus' fraud in the inducement of the contracts (see Resp. Br. 2, 8).

The argument misses the mark. As Commonwealth has explained (Pet. Br. 7-8), the First Circuit's decision turned on that Court's consideration of Commonwealth's complaint seeking rescission and damages. The Court's determination was that the complaint was insufficient to support a trial of the fraud issue raised by the complaint, because it was not coupled with an intent to return the consideration (the refineries) to Lummus and because of Commonwealth's apparently late assertion of the fraud alleged (Pet. Br. 9). But the First Circuit specifically and clearly left undisturbed the findings below of Judges

Magruder and Ruiz Nazario that a substantial issue of fraud had been made out. The First Circuit said:

> ". . . Although arguments have been presented on the issues of falsity and reliance, we believe that a substantial issue has been made out. The real difficulty lies in the question of fraudulent (or reckless) intent. . . . But having in mind the intangible nature of fraud, and the inherent difficulties of proof, we are short of willing to reverse the lower court's preliminary findings, and believe it preferable to look into other issues." (R. 484-85; S.A. 47)

It was only the ultimate rulings of those Judges which, because of what the First Circuit felt to be the insufficiency of the complaint for rescission, were overturned.*

On page 8, Lummus attempts to make use of Commonwealth's argument in its earlier petition that the First Circuit had acted improperly in excluding Commonwealth's evidence, submitted by affidavit on petition for rehearing, as to the time of discovery of the fraud, and had thus barred it from a trial of the issues in that proceeding. Commonwealth's argument that the First Circuit seemingly had gone too far could have no effect on the present proceeding (compare: *United States* v. *United States Smelting Refining & Mining Co.*, 339 U.S. 186, 198-99 (1950)).

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* In Lummus' footnote on page 8 of its brief, the word "findings" must be read in careful contradistinction to the word "rulings" to convey an accurate impression of the effect of the First Circuit decision.

ARGUMENT

I

Lummus does not question that the Second Circuit's decision extends the mandamus power to a heretofore virgin area, and barely attempts analysis of the decisions of this Court or of the Courts of Appeal in conflict with the present holding. The Lummus brief merely asserts that the powers granted under the All Writs Act, 28 U.S.C. § 1651, are so discretionary that their exercise, right or wrong, is of little interest to this Court. Lummus supports its position with the sweeping assertion that, with respect to the application of § 1651 by the Courts of Appeal, this Court "has heretofore articulated, insofar as they can be articulated, the principles which should govern" (Resp. Br. 18). In short, the scope of mandamus, according to Lummus, is now fixed and a private preserve of the Courts of Appeal.

Lummus' brief sidesteps by silence most of the difficult questions. It avoids, for example, coping with the important decisions cited by Commonwealth (Pet. Br. 19), in which this Court has declined to sanction mandamus to permit interlocutory review in cases involving principles no more discretionary than the principle of "finality" involved here (Resp. Br. 15, 17). Except for the argument that the Second Circuit's decision can be restricted to the particular facts of this case, an argument which is totally baseless (see pp. 1-2, *supra*), Lummus apparently has nothing to offer but its own conviction that there is some ineffable difference between the Second Circuit's new theory of "finality" and all other principles in the

service of which mandamus has been sought and denied.*

Again, in referring to the Second Circuit's solicitude for a supposed "conclusive determination" by another Court of Appeals (Resp. Br. 15), Lummus artfully dodges the question whether the Second Circuit's definition of "finality" does not itself contain substantial discretionary elements which would make a District Court's determination immune from interlocutory appellate intervention under § 1651 except upon a finding of gross abuse.

It may be added that no finding was made by the Second Circuit, nor did Lummus make any suggestion below, that "public confidence in the courts" was in any way involved in the present action (Resp. Br. 16).**

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* Lummus attempts to fabricate a concession by Commonwealth that the issues before the Second Circuit were "extraordinary" and thus worthy of mandamus (Resp. Br. 15). This is done by citing Commonwealth's good faith joinder in a motion to expedite whatever review there was to be by the Second Circuit. Lummus states that "Both parties had joined in recognizing the *extraordinary* character of the issues presented by the petition for mandamus" (*ibid.*; italics added). This statement has no basis whatever. Neither the word "extraordinary", nor any word in its place, was used in the joint motion. The joint motion specifically stated that

> "Commonwealth Oil Refining Company, Inc., contends that the order of June 23, 1961, is not appealable and should not be reviewed on petition for mandamus and intends by appropriate motion and opposition to bring these contentions before this Court. Joinder in the present motion is not a waiver of these contentions."

** *In re Union Leader Corp.*, 292 F.2d 381 (1st Cir. 1961), *cert. denied*, 30 U.S. Law Week 3180 (Dec. 4, 1961), cited by Lummus for the proposition that such "public confidence" is a consideration, denied the writ.

It should be noted that Lummus' description of *Gulf Research & Development Co.* v. *Leahy*, 193 F.2d 302 (3d Cir. 1951), *aff'd by an equally divided Court on other issues*, 344 U.S. 861 (1952), and *TCF Film Corp.* v. *Gourley*, 240 F.2d 711 (3d Cir. 1957) (Resp. Br. 16-17), is misleading. The reservation of decision in the latter case, on the issue whether mandamus should be granted where too little effect had been given to the decision of another district judge, was accompanied with a "But see" citation to *Gulf Research*, where the same Court had held mandamus would not lie to prevent a possibly too broad effect being given to such a decision.*

Lummus' further statement that the Third Circuit's denial of mandamus in *Gulf Research* concerned a lower court order which had "properly" given conclusive effect to the prior ruling of another court (Resp. Br. 16-17) is Lummus' characterization of the order, not the Third Circuit's. The Appellate Court held that even if the lower court had erred in giving effect to the prior ruling, mandamus would not lie to correct the error. 193 F. 2d at 304.

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* Commonwealth of course did not, as Lummus appears to suggest (Resp. Br. 16), present *TCF Film* as a holding on the point. The statement for which Commonwealth cited *TCF Film* was that the Third Circuit "has indicated in a post-*LaBuy* decision that this holding [*Gulf Research*] *would be* given substantial weight if the converse question —of giving too little effect to such a decision— *were to arise*." (Pet. Br. 19-20; italics added.)

II

Lummus' first suggestion under this point is that the First Circuit decision be treated as if it were a final disposition in a separate proceeding for a stay (Resp. Br. 19).* This is both contrary to the actual procedural setting of the former action (see pp. 5-6, *supra*; Pet. Br. 7-9), and ignores the fact that the jurisdiction under which the First Circuit rendered its decision was founded on § 1292(a)(1), and that no judgment final under § 1291 has ever been entered in the Puerto Rican proceedings. Lummus' related proposition, that "the order of the Court of Appeals for the First Circuit was final because it finally disposed of Commonwealth's motion to stay arbitration" (Resp. Br. 22), reveals that Lummus does not even forthrightly support the Second Circuit's discretionary definition of "finality".

The real issue—why the clear statutory guidelines of finality and non-finality applicable to appeals should be abandoned in the federal law of judgments, and a broadly discretionary principle substituted—is nowhere met.

Lummus' reliance on summary judgment decisions (Resp. Br. 20) is misplaced, since each of

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* Because there appears to be some possibility of confusion from Lummus' language on the finality point, it should be reiterated that the Second Circuit made it clear that it regarded fraud in the inducement and the other issues as remaining open to the arbitrators:

> "We add for clarity that we do not hold any determination by the First Circuit with respect to fraud, rescission, etc. to be conclusive save on the limited issue of arbitrability." (S.A. 105 n. 8)

the decisions cited involved the entry of a judgment disposing of the entire action and clearly final under § 1291. The New York decisions which Lummus cites as "directly in point" (*ibid.*) involved orders which, as the Second Circuit conceded (S.A. 104), are deemed under New York law to be final for purposes of the appeal provisions of the Civil Practice Act.*

In contrast, Lummus treats in cursory fashion the decisions of this Court directly rejecting the *res judicata* effect of orders entered on interlocutory appeals. This Court's recent decision in *Hoffman* v. *Blaski*, 363 U.S. 335 (1960) (see Pet. Br. 22-23) is vaguely explained as having been based on "various reasons arising out of the peculiarities of the situation which had developed in that case" (Resp. Br. 22). No analytic attempt is made to show why the rule stated in that decision, that "principles of *res judicata* do not apply" where the orders involved

> ". . . were (1) interlocutory, (2) not upon the merits, and (3) were entered in the same case by courts of coordinate jurisdiction" (363 U.S. at 340 n. 9),

should not apply in the present litigation. Lummus simply asserts (Resp. Br. 22) that the present decision of the First Circuit *was* "final" and *was* "on the merits".

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* Lummus complains there are "few direct precedents" (Resp. Br. 19). There are in fact none if the question is artificially limited to the issues affecting arbitrability, as Lummus attempts to do. But when the question is given its proper scope and related to the conclusiveness of judgments rendered on appeals taken under § 1292(a)(1), the precedents are clear and the conflict with the present decision a palpable one.

If there is any mystic virtue in the issues before the First Circuit which makes those issues more susceptible to "finality" under the law of judgments than those in *Hoffman*, although not final under the law of appeals, then we respectfully suggest that Lummus has failed to put its finger on the difference.

It is difficult to understand Lummus' proposition that "in numerous decisions the Federal courts have held that interlocutory decisions are frequently conclusive with respect to issues actually litigated and determined" (Resp. Br. 24). The cases cited involved a special rule followed by some courts in the field of patent litigation (and even there clearly rejected by others, see Pet. Br. 24-25).*

The final paragraph of this point, modestly disavowing any effect beyond this case for the Second Circuit's new theory of "finality", requires no comment.

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* Each of the decisions cited by Lummus, other than *Bee Mach. Co.* v. *Freeman*, 131 F. 2d 190 (1st Cir. 1942), *aff'd on other grounds*, 319 U.S. 448 (1943), related to suits for patent infringement, in which the previous judgment left open only the matter of an accounting. These decisions (in each of which the determination on the patent issues followed a plenary hearing) are probably attributable to what these courts felt to be the spectacular possibilities for multiple litigation inherent in the patent field, and the historically separate nature and often unusual length of the accounting proceedings. But there is no doubt that, improperly extended as suggested by Lummus (the Second Circuit did not cite them), these cases are in conflict with the numerous decisions noted in the petition on the question of the effect of interlocutory judgments (Pet. Br. 21-25). (In *Bee Mach.*, which was also a patent case, the first court after plenary hearing had entered a decree dismissing the bill of complaint, and leaving only defendant's counterclaims to be decided.)

III

Lummus here ignores the difference between review had in normal proceedings on interlocutory or final appeals and the exceptional appellate intervention permitted under § 1651. Its citation of cases in the former circumstances, with which Commonwealth of course has no quarrel, and its failure to discuss decisions such as *Ex parte Wagner*, 249 U.S. 465 (1919), and *Hoffa* v. *Letts*, 282 F.2d 842 (D.C. Cir. 1960) (Pet. Br. 27), which specifically deny review under § 1651 to prevent prospectively erroneous decisions, appear of a piece with Lummus' consistent refusal to face the issues. Lummus would cover its total lack of precedent by saying "It is well settled that when a case is properly before an appellate court *for review* of an interlocutory order, the Court is not restricted to the issues raised by the interlocutory order" (Resp. Br. 25-26; italics added), but the cases cited and the quotation (Resp. Br. 26) clearly refer to review upon appeal, not review *simpliciter*.

Lummus' position on the Second Circuit's determination of the insurance exception issue is contained in the statement that "The facts upon which the Court of Appeals relied were *established* by affidavits and documentary evidence submitted by Lummus" (Resp. Br. 26; italics added). Offering only this conclusory sentence, and without citing a single mandamus case, Lummus thus considers it settled that the Second Circuit has power under § 1651 to deprive the District Court of its prerogative, already exercised favorably to Commonwealth, of refus-

ing a summary ruling in Lummus' favor on the issue. This the Second Circuit may do, Lummus allows, simply by deciding for itself at this point in the proceedings that Lummus has "established" (1) the purpose and meaning of the insurance provision and (2) what kind of insurance Lummus carries, and then under color of the All Writs Act may proceed to deprive Commonwealth of those protections, including a plenary hearing with the right to cross-examination, which would be normally afforded in our system to a party whom the trial judge believed to have successfully carried an issue beyond the summary stage.*

IV

The important issue raised by this question is of a kind which may be considered, in the discretion of this Court, even if not previously raised below. See, *e.g.*, *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941);

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* Lummus makes certain assertions with respect to Commonwealth's position as to the insurance exception issue before the Second Circuit. In this connection it is appropriate to quote from the brief of Commonwealth before that Court:

> "Lummus' argument (Resp. Br. 36-39) depends on extrinsic 'evidence' of an extremely dubious tendency and completeness. The Court below has, therefore, properly found the material presented inadequate and has ordered the issue to trial. To establish a factual foundation for arguing this point Lummus would have to prove its extrinsic evidence, the relevancy of that evidence to the case and the connection between that extrinsic evidence and the supposed relation between the insurance exception and the language of Section 12.10 of the 1954 contract (which is the same as that of Section 12.9 of the 1956 contract) . . . [R. 719]." (p. 27)

Weems v. United States, 217 U.S. 349, 362 (1910). For the rest, Lummus' argument on this point is purely assertive.

Conclusion

The writ of certiorari, as respectfully prayed in the petition, should be granted.

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